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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 586

WILLIAM JACKSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States Court of Claims (R. 112–115) is reported at 297 F. 2d 939.

JURISDICTION

The judgment of the Court of Claims was entered on January 12, 1962. Petitioner's timely motion for a rehearing was denied on April 4, 1962. The petition for a writ of certiorari was filed on July 3, 1962, and was granted on November 13, 1962, 371 U.S. 900 (R. 117). The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner, a former enlisted man in the Air Force, is entitled to back pay on either of two grounds:

(1) That he was not validly discharged upon his conviction of a felony by civil authority; or,

(2) That he should have been reinstated upon the reversal of the conviction on appeal.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of 10 U.S.C. 1552 and 8811 are set forth in the appendix, *infra*, pp. 25–27. Air Force Regulation 39–22, dated September 23, 1953, is printed in the record at pp. 97–106. The present version of the same Regulation, effective April 14, 1959, is reproduced in pertinent part in the Appendix, *infra*, pp. 27–35.

STATEMENT

On November 16, 1956, while serving as an enlisted member of the Air Force, petitioner was convicted in the District Court for Jackson County, Oklahoma, on his plea of guilty to the crime of rape in the second degree. He was sentenced by the court to serve a term of five years in the State Penitentiary at McAlester, Oklahoma (R. 1, 86–87). Having recently re-enlisted for a six-year period, his term of service would normally have expired in December, 1961 (R. 95).

On November 24, 1956, petitioner was discharged from the Air Force under other than honorable conditions (R. 93, 95) and issued an "undesirable" certificate, pursuant to former Air Force Regulation 39–22,

dated September 23, 1953, which provided for the administrative discharge of airmen who, subsequent to their enlistment, were convicted by civil courts of offenses punishable by death or by imprisonment for more than one year.

On December 22, 1956, petitioner filed a motion in the Oklahoma district court to vacate the judgment of conviction and for a new trial. This motion was denied on January 8, 1957, and on January 9, 1957, petitioner appealed to the Criminal Court of Appeals of Oklahoma (R. 1). On September 20, 1957, eleven months after his conviction, the Criminal Court of Appeals vacated the judgment on the ground that petitioner had been denied his right to counsel and remanded the case to the State district court for a new trial. *Jackson* v. *State*, 316 P. 2d 213. On May 6, 1956, on remand, the proceedings were dismissed at the County Attorney's instance (R. 8-9).

By letter dated June 4, 1958, petitioner, through his attorney, advised the Air Force of these developments and requested the necessary forms to petition for reinstatement and back pay. (R. 111). He then filed an application, dated November 4, 1958, with the Air Force Discharge Review Board for revocation of his discharge and for reinstatement in the Air Force with back pay (R. 4). This application was subsequently abandoned,[1] however, and on February

[1] Petitioner presumably learned that the Correction Board alone could grant the relief sought. The Discharge Review Board has authority only to change the *character* of the discharge; it cannot revoke the discharge or order reinstatement. See 10 U.S.C. 1553; 32 C.F.R. 881.17(c).

9, 1959, petitioner applied to the Air Force Board for the Correction of Military Records for the same relief (R. 9–13).

The Board for the Correction of Military Records held a hearing on petitioner's application on September 16, 1959, and on April 28, 1960, announced its decision denying his application (R. 16). The Board found that, "[w]hatever the merits of [petitioner's] case may have been they have been dissipated by his failure to be completely truthful and straightforward in his testimony before the Board (R. 18, 23)." This decision was approved by the Secretary of the Air Force on the same day (R. 17).

Petitioner then instituted these proceedings in the Court of Claims. His complaint alleged that he had been illegally and unlawfully discharged from the Air Force and that the action of the Secretary in refusing to reinstate him and award him back pay was arbitrary and capricious. By way of relief, he sought pay and allowances from the date of his discharge (R. 2). The Court of Claims unanimously rejected petitioner's contentions and dismissed the suit (R. 112–116).

Following the filing of the petition for a writ of certiorari in this Court, and at the instance of the Solicitor General, the Secretary of the Air Force authorized the correction of petitioner's discharge to reflect that it was an honorable one.[2] Petitioner's

[2] The tender of an honorable discharge certificate was made *before* this Court granted certiorari (Brief for the United States in opposition to the petition for certiorari, p. 4), not afterwards, as petitioner states (Petitioner's Brief, p. 14).

counsel has been advised that, upon request, petitioner will be granted an honorable discharge certificate in lieu of the one he now holds. To date, petitioner has not applied for the honorable discharge certificate.

SUMMARY OF ARGUMENT

While the present suit seeks only recovery of back-pay since the date of petitioner's dismissal from the Air Force upon his civil conviction for statutory rape, the claim necessarily depends upon the validity of the original discharge or petitioner's right to retroactive reinstatement at a subsequent date.

I

The initial dismissal was effected pursuant to an Air Force Regulation then in force which prescribed the immediate dismissal of airmen convicted of a felony by a domestic civilian court. The Secretary of the Air Force is expressly empowered to promulgate procedures for the premature discharge of enlisted personnel before the expiration of their term of enlistment. The regulation in suit is, on its face, a reasonable exercise of that authority. Though it directs the issuance of an "undesirable" discharge certificate, its purpose is not punitive. The regulation embodies a policy of promptly separating convicted felons, not so much because they are felons, but because they will, in all probability, remain unable to serve for an extended period and because their retention would adversely affect morale and discipline. Under the circumstances, there can be no requirement of looking behind the civil court judgment or awaiting the outcome of a pending appeal.

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II

Assuming he was validly discharged, petitioner acquired no *right* to automatic reinstatement in the Air Force when his conviction was reversed by the state court. We assume he was then entitled to have his discharge certificate corrected. But that question is removed from the case by the Secretary's tender of an honorable discharge certificate. On the separate question of his retention in the Air Force, the original dismissal action was final as a matter of general law. The statute creating the Board for the Correction of Military Records merely *authorized* reinstatement in exceptional circumstances. But, before exercising its discretion to recommend such action, the Board must be persuaded that the airman is a fit candidate for the service. Petitioner, on the contrary, led the Board to the conclusion that he was untruthful. Its decision, after full hearing, was certainly not grossly arbitrary.

ARGUMENT

This is a suit for back-pay only. Yet, the claim necessarily rests on allegations that petitioner was improperly discharged from the Air Force in the first instance or that he was improperly refused reinstatement (retroactively or otherwise) upon reversal of the state court conviction which led to his original dismissal.

If the matter were *res nova,* we might question the propriety of demanding a money judgment without

first obtaining, or at least concurrently seeking, the reinstatement on which the pay claim depends. But, given the established jurisprudence apparently approving this procedure,[3] the burdensome problems resulting from the limited jurisdiction of the Court of Claims[4] and of the district courts,[5] and the peculiar history of this case, in which the judgment was rendered after petitioner's term of enlistment had expired,[6] we pass the question and turn to the underlying merits of the claim.

We first discuss the original discharge, and finding that action authorized, we address ourselves to the only remaining question, whether the Air Force was required to reinstate petitioner when his conviction was reversed on appeal.

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[3] See Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. Bar J. 179 (1961), cited in *Glidden Company* v. *Zdanok*, 370 U.S. 530, 557 (opinion of Mr. Justice Harlan).

[4] The Court of Claims, of course, could not order reinstatement. Its jurisdiction is limited to the award of money judgments. 28 U.S.C. 1491; see *United States* v. *Jones*, 131 U.S. 1; *United States* v. *Sherwood*, 312 U.S. 584, 588; *Glidden Company* v. *Zdanok*, *supra*, at 537.

[5] The district courts are expressly barred from entertaining "[a]ny civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States." 28 U.S.C. 1346(d)(2).

[6] We assume petitioner asserts no right to reinstatement after the expiration of his term of enlistment in December, 1961, and claims no pay after that date. Accordingly, the question of reinstatement was moot when the Court of Claims rendered judgment on January 12, 1962 (R. 112).

I

PETITIONER WAS VALIDLY DISCHARGED UPON HIS STATE COURT CONVICTION FOR STATUTORY RAPE

Petitioner was dismissed from the Air Force pursuant to an Air Force Regulation prescribing prompt discharge of airmen convicted of a felony by civilian authority. That regulation, we submit, was a reasonable rule, adopted by the Secretary under statutory authority in the interest of the efficiency of the service, and its application to petitioner deprived him of no constitutional rights.

There is, of course, no *constitutional* right to retain public office, once acquired, for any particular period. As this Court recently observed, citing many earlier precedents,[7] it "has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896. The principle applies to those in the military service of the United States. *McElrath* v. *United States*, 102 U.S. 426; *Blake* v. *United States*, 103 U.S. 227; *Crenshaw* v. *United States*, 134 U.S. 99; *Wallace* v. *United States*, 257 U.S. 541; *Reid* v. *United States*, 161 Fed. 469 (S.D. N.Y.), appeal dismissed, 211 U.S. 529; *McMullen* v. *United States*, 100 Ct. Cls. 323, certiorari denied, 321 U.S. 790.

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[7] *In the Matter of Hennen*, 13 Pet. 230, 246; *Crenshaw* v. *United States*, 134 U.S. 99, 108; *Parsons* v. *United States*, 167 U.S. 324, 331–334; *Keim* v. *United States*, 177 U.S. 290, 293–294; *Taylor and Marshall* v. *Beckham* (No. 1), 178 U.S. 548, 575–578.

Nor does enlistment for a stated term confer an absolute *statutory* tenure. While there are, of course, restrictions on separation of a serviceman before the expiration of his contract, Congress has always recognized the authority of the executive to discharge soldiers before the end of their enlistment period. Thus, the Act of April 10, 1806, "establishing Rules and Articles for the government of the Armies of the United States," Art. 11, 2 Stat. 359, 361, provided that "no discharge shall be given to a non-commissioned officer, or soldier, before his term of service has expired, but by order of the President, the Secretary of War, the commanding officer of a department, or the sentence of a general court martial." Re-enacted from time to time by the Congress in substantially the same form, see *Reid* v. *United States, supra,* the controlling statute today with respect to the Air Force, 10 U.S.C. 8811(b), expressly recognizes the authority of the Secretary to provide for premature administrative separation of airmen:

> No enlisted member of the Air Force may be discharged before his term of service expires, except—
>
> (1) As prescribed by the Secretary of the Air Force;
>
> (2) By sentence of a general or special court-martial; or
>
> (3) As otherwise provided by law.

Pursuant to this authority, the Secretary has promulgated a series of regulations providing for the involuntary administrative discharge of airmen. Among the causes specified are "unsuitability" (AFR

39–16), "unfitness" (AFR 39–17), or simply, the "convenience of the government" (AFR 39–14). Air Force Regulation 39–22, here involved, is one of the series. At the time of petitioner's discharge in 1956,[8] it prescribed a "general policy" of administratively discharging as "undesirable" airmen convicted by an American civil court of any offense punishable by death or imprisonment for more than one year. ¶ 5 (R. 99).

Given power to provide for premature separations, there can be no quarrel with the Secretary's decision to provide for the dismissal of persons who have been convicted of crime by a competent domestic tribunal. Nor do we understand petitioner to question the propriety of this procedure in the light of the concededly "broad administrative powers [of the Air Force] to discharge its personnel" (Br. 9). But petitioner complains that the Regulation is unreasonable because it provides for summary dismissal, "under less than honorable conditions," (1) without an adversary hearing, (2) without awaiting the outcome of an appeal from the conviction, and (3) without investigating the regularity of the proceedings which led to the judgment of conviction. We shall address ourselves to each of these points in turn.

[8] The full text of the regulation in suit, dated September 23, 1953, appears at R. 97–106. As later noted, the regulation was subsequently superseded by new AFR 39–22, dated April 14, 1959, pertinent portions of which are reproduced in the Appendix (pp. 27–35, *infra*).

1. As to so-called "regulars,"[9] former Air Force Regulation 39-22 expressly provided that "recourse to board proceedings is unnecessary" (¶5; R. 99). Whether or not adversary hearings are ever constitutionally required preliminary to the discharge of military personnel,[10] certainly no such procedure was

[9] Reserve airmen were entitled to an administrative hearing under rare circumstances. See ¶5a (R. 99–100). This provision of the Regulation was compelled by the Armed Forces Reserve Act of 1952, 66 Stat. 495, §§ 249(b) and (c), now incorporated in 10 U.S.C. 1163(c), which required board proceedings before the administrative separation of any reservist "under conditions other than honorable" unless he was sentenced to *imprisonment* after civil conviction. There is no similar statutory limitation as to regulars. In any event, the requirement is inapplicable where (as here) the airman is actually incarcerated by the civil authorities.

The present Regulation 39–22 extends the hearing procedure to *all* airmen, regulars and reservists alike, without regard to the sentence imposed, adding a right to have military counsel appointed. ¶7 (*App., infra*, pp. 30–32). That decision reflects a more generous waiver policy, dismissal now being withheld "often", whereas under the former Regulation waiver of dismissal was thought warranted only in "isolated cases." Compare ¶3 of the current Regulation (App., *infra*, p. 27) with ¶5b of the earlier Regulation (R. 100–102). Even now, however, there is no right to present live witnesses (¶7b(4)(d), App., *infra*, pp. 30–31); indeed, the hearing will not wait for the airman himself if he is unavailable. ¶¶7b(4)(b) and 7e (App., *infra*, pp. 31, 32–33). But in any event, the present policy of affording everyone a limited hearing in no way affects the reasonableness of the former Regulation which prescribed a different procedure.

[10] See *McElroth* v. *United States*, 102 U.S. 426; *Blake* v. *United States*, 103 U.S. 227; *Crenshaw* v. *United States*, 134 U.S. 99; *Wallace* v. *United States*, 257 U.S. 541. But see, *Bland* v. *Connally*, 293 F. 2d 852 (C.A.D.C.), and *Davis* v. *Stahr*, 293 F. 2d 860 (C.A.D.C.), indicating that an adversary hearing may be required when the serviceman is discharged for security reasons.

necessary here. The reason for dispensing with a hearing in the present context is obvious: once the fact of civil conviction has been established, as it may be by authenticated documents,[11] there remains nothing to hear. Short of re-trying the criminal case,[12] no purpose could be served by holding a hearing. The airman has already had full opportunity to contest the underlying charge in court proceedings. Once convicted, whether on his own plea or by the verdict of a jury, there are no additional relevant facts to establish; there are no further accusers to confront and cross-examine; and there is no remaining defense as to which the testimony of witnesses can be relevant.

Under the circumstances, the fact that an "undesirable discharge" certificate was prescribed by the Regulation does not affect the question. Whatever incidental prejudice resulted, neither the dismissal, nor its characterization, was punitive in purpose. The discharge itself was intended to promote the efficiency of the service by eliminating a member who would probably remain unavailable for an extended period and whose retention would adversely affect morale and discipline. The label "undesirable" was, at the time, an accurate description of the reason for the dismissal. The distinction between the punitive "dis-

[11] In the rare case where the airman contests that he is in fact the person described in the documents attesting to the conviction there may be occasion to hold a hearing limited to the issue of identity. No such problem is involved here, however. Petitioner has never denied his conviction.

[12] See pp. 16–17, *infra*.

honorable" and "bad conduct" discharges issued pursuant to court-martial proceedings and the "general" or "undesirable" discharges resulted from administrative action is well recognized. See *United States* v. *Kingsley*, 138 U.S. 87, 89, 92; *Reid* v. *United States*, *supra*; *Nistal* v. *Hausauer*, 308 N.Y. 146, 154, 124 N.E. 2d 94, 98, certiorari denied, 349 U.S. 962.[13] The fact is that, historically, the issuance of an "undesirable" discharge has never been viewed as "punishment"; nor is that its purpose. Cf. *Kennedy* v. *Mendoza-Martinez*, No. 2, this Term, decided February 18, 1963. There is accordingly no basis for invoking the procedural guarantees of the Fifth and Sixth Amendments with respect to the imposition of criminal penalties, even assuming they are otherwise relevant in the area of military discipline.[14]

2. Petitioner's claim that the Regulation is unreasonable because it fails to suspend dismissal while the underlying conviction is challenged on appeal fares no better.

There can be no serious question respecting the right of the military establishments to separate per-

[13] See also, Davis, *A Treatise on the Military Law of the United States* (3d ed., 1913), pp. 353, 356–357; Howland, *Digest of Opinions of the Judge Advocates General of the Army* (1912); p. 435; Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?* 41 Cornell L.Q. (1956) 545, at 552–568; Winthrop, *Military Law and Precedents* (1920 ed.), p. 549.

[14] See, generally, the reprint of the third James Madison Lecture by Mr. Chief Justice Warren, entitled "The Bill of Rights and the Military," in 37 N.Y.U.L. Rev. 181 (1962).

sonnel in the interest of the efficiency of the service. When a person is convicted of a felony "a garb of guilt" immediately attaches and this presumption is not removed by the taking of an appeal. It is certainly a reasonable judgment on the part of the military authorities that the retention on the rolls of a serviceman convicted of a serious crime will impair morale and discipline. Moreover, in many instances [15] (as here), the conviction is followed by immediate incarceration by the civil authorities, with the consequence that the serviceman is, as a practical matter, disabled from performing his military duties. This latter consideration is reflected in the provisions relating to juvenile offenders who, while generally not within the discharge policy of the regulation, were nevertheless to be separated if committed by the civil authorities for more than one year. ¶ 7b (R. 103).[16]

The Air Force practice is not original. In *McMullen* v. *United States*, 100 Ct. Cls. 323, certiorari denied, 321 U.S. 790, the forfeiture provision of former section 113 of the Criminal Code [17] (the conflict of in-

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[15] Petitioner's case is, unfortunately, not an isolated instance. The Air Force, the Army and the Navy (which have current regulations similar to Air Force Regulation 39-22) advise us that, in fiscal 1961, and again in fiscal 1962, over twenty-two hundred servicemen were separated from these services because of civil convictions.

[16] Again, the fact that the Air Force, in its current regulations, has departed from its former general policy of immediate discharge in these cases does not affect the reasonableness of its earlier policy. Even under the present version of Air Force Regulation 39-22, an immediate discharge of a serviceman is permitted under appropriate circumstances. ¶ 11 (App., *infra*, p. 34).

[17] R.S. 1782; Act of March 4, 1909, c. 321 § 113, 35 Stat. 1109.

terest statute with respect to federal officers and employees) was held to effect an immediate and irrevocable removal from military office upon conviction, without regard to a successful appeal. As petitioner has noted,[18] the Navy does not expressly require suspension of discharge action pending appeal. And the same rule is followed in the majority of states having similar laws. The prevailing view is that upon conviction of a felony, the public official or employee must be removed from his position immediately, without regard to the outcome on appeal. *State, ex rel. Zempel* v. *Twitchell* (Sup. Ct. of Wash.), 367 P. 2d 985; *People, ex rel. Keenan* v. *McGuane*, 13 Ill. 2d 520, 150 N.E. 2d 168, certiorari denied, 358 U.S. 828; *McKannay* v. *Horton*, 151 Cal. 711, 91 P. 598;[19] *State* v. *Redman*, 183 Ind. 332, 109 N.E. 184; *Bell* v. *Treasurer of Cambridge*, 310 Mass. 484, 38 N.E. 2d 660; *Attorney General, ex rel. O'Hara* v. *Montgomery*, 275 Mich. 504, 267 N.W. 550; *State, ex rel. Hunter* v. *Jurgenson*, 135 Neb. 136, 280 N.W. 886, certiorari denied, 307 U.S. 643; *State, ex rel. DeConcini* v. *Sullivan*, 66 Ariz. 348, 188 P. 2d 592; *Smith* v. *Noepped*, 204 Misc. 49, 120 N.Y.S. 2d 466; *In re Obergfell*, 239 N.Y. 48, 145 N.E. 323; *State, ex rel. Salisbury* v. *Vogel*, 65 N.D. 137, 256 N.W. 404; *State, ex rel. Giles* v. *Burke*, 101 Utah 48, 117 P. 2d 454; *State, ex rel. Blake* v. *Levi*, 109 W. Va. 277, 153 S.E. 587; *Becker* v. *Green County*, 176 Wisc. 120, 184 N.W. 715, affirmed, 186 N.W. 584; Annotation, 71 A.L.R. 2d 593. But see, *People* v. *Enlow*, 135 Colo. 249, 310 P.

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[18] See Petitioner's Brief, Appendix B.

[19] Cf. *Byers* v. *Smith*, 4 Cal. 2d 209, 47 P. 2d 705.

2d 539; and *City of Pineville* v. *Collett*, 294 Ky. 853, 172 S.W. 2d 640.

3. Finally, there is no merit in the suggestion that the Air Force must look behind the civil judgment of conviction and investigate the procedural regularity of the court action before discharging on that basis. Certainly the judgments of American [20] courts in felony cases are entitled to full faith and credit. Indeed, it would be unseemly for the military establishments, themselves excused because of special exigencies from observing all the normal safeguards, to question the adjudication of civilian tribunals where the defendant enjoys all the procedural rights guaranteed by a generous law. Proper respect for the independence of the civilian authority forbids any such "second-guessing." Moreover, since the dismissal is effected, not as punishment, but for practical reasons of service efficiency and morale, there is no useful purpose to be served by an investigation of the court proceedings. At least, refusal to undertake that inquiry is not unreasonable.

The facts of this case do not warrant an exception to the rule. Even if a closer look at the conviction is sometimes appropriate, this is not such an instance. Indeed, here, petitioner, for all that appeared, voluntarily pleaded guilty to a serious offense. To be sure, it develops that he was not then afforded an opportunity to obtain counsel and his conviction was subsequently reversed on that ground. But the

[20] Understandably, the Regulation did not accord the same automatic effect to the judgments of foreign courts. See ¶8 (R. 103). (The printed Record erroneously numbers the paragraph "3." instead of "8.")

absence of counsel, of itself, would not vitiate his plea, for he might have effectively waived his right to representation. There was thus no plain defect on the face of the record which the Air Force might be charged with noticing.

We conclude that former Air Force Regulation 39–22 prescribed a permissible procedure adopted "in the general interest of sound and reasonable personnel management and policy." S. Rep. 1268, 80th Cong., 2d Sess., p. 7. Having followed its own Regulation to the letter, in circumstances appropriate to its application, there can be no question about the correctness of the Air Force action in originally dismissing petitioner. It remains only to consider the effect of the reversal of his criminal conviction.

II

UNDER THE CIRCUMSTANCES, THE AIR FORCE WAS NOT REQUIRED TO REINSTATE PETITIONER UPON THE REVERSAL OF HIS CONVICTION

At the petition stage, petitioner conceded that the Air Force was not "required to retain [him] in the service after his conviction by the Oklahoma district court because of some contractual relationship" (Reply Brief, p. 1).[21] His sole contention, he said, was that "the Air Force was under an obligation to reinstate him upon reversal and vacation of conviction by the Court of Criminal Appeals of Oklahoma when

[21] If the concession were accepted, all of our discussion under Point I would be "irrelevant," as petitioner said (*ibid.*). But petitioner appears to have shifted position. His brief on the merits, if we understand it correctly, attacks the regulation itself and the original discharge effected under it (see pp. 8–10, 14–15).

he was discharged pursuant to a regulation which authorized discharge only for that one reason—criminal conviction by a civil court" (*ibid.*). We now address ourselves to that argument, emphasizing again that this is a matter entirely discrete from the question whether there was an obligation, when the criminal charges against petitioner were terminated, to correct the "undesirable" characterization in the discharge. The latter question is not in this case. See statement, *supra*, pp. 4–5.

1. There is, of course, no inherent right to reinstatement under the present circumstances. Assuming, as we do, that the original dismissal was proper, there is no question of revoking that action. This case, unlike *Harmon* v. *Brucker*, 355 U.S. 579, does not involve "an act of a government official which is in excess of his express or implied powers," or the appropriateness of granting "relief from * * * illegality." *Id.*, at 581–582. The initial action here was plainly authorized. The only question remaining is whether an intervening fact—the reversal of petitioner's conviction by the State appellate court—required a specific *new* action by the service—reinstatement with back pay.[22]

The general law of contracts imposes no such requirement. As Professor Corbin says: "If a contractor is prevented, by his arrest, and conviction for crime, from rendering substantial performance of his promise, the other party will be *discharged* in accord-

[22] Petitioner never requested different action, such as a change in the character of his discharge, from "undesirable" to "honorable," and has thus far declined the Air Force's offer of a corrected certificate.

ance with the usual rules governing failure of consideration * * * [e]ven if the contractor was not the unexcused cause of his own imprisonment * * *." 6 Corbin, *Contracts* (1962), § 1352, p. 454 (emphasis added). And, of course, a "discharge" ends the obligation; it does not merely suspend performance. See 5 *id.* (1951), §§ 1228–1229, pp. 935–938. A temporary inability to perform, if known to be such, may only justify suspension of the reciprocal obligation. But, when the impediment is likely to continue and substitute services may have to be procured, the probability of long unavailability is justification for a complete discharge. 6 *id* § 1253, pp. 7–16; § 1348, pp. 439–442. Thus, here, the Air Force, faced with the case of an airman who, whether by his own fault or not, was likely to remain disabled for five years, was fully justified in terminating its "contract" with him. And, having done so, it was under no legal duty to revive the agreement or enter into a new contract for his services.

Certainly, petitioner has no special right to reinstatement because his contract is with the government. Indeed, as a soldier, he is, in effect, an employee at will. And even in the context of dismissal for cause, there is no obligation to reinstate upon a later showing that the grounds for discharge may not have been well founded. Thus, in *Finn* v. *United States*, Ct. Cls. No. 254–58, decided January 18, 1961, the court, in effect, upheld the Internal Revenue Service's refusal to reinstate an employee discharged for conspiring to submit a false report despite his subsequent acquittal on the same charges. The same result was sustained

with respect to another Internal Revenue Service employee in *Croghan* v. *United States*, 116 Ct. Cls. 577, certiorari denied, 340 U.S. 854. And, while they were ultimately reinstated by discretionary executive action, Customs and Post Office employees have been held to have no right to reinstatement in comparable circumstances. *Eberlein* v. *United States*, 257 U.S. 82; *Bryant* v. *United States*, 122 Ct. Cls. 460, certiorari denied, 344 U.S. 913. See also, *State, ex rel. Guthrie* v. *Chapman*, 187 Wash. 327, 60 P. 2d 245. There is certainly no justification for a different rule in the case of the military services. As one would expect, the same principle governs here, too. See *McMullen* v. *United States, supra.*

2. Petitioner, however, relies on the statute authorizing the creation of the Air Force Board for the Correction of Military Records, claiming to find there a mandate for reinstatement under the present circumstances. But the text of the provision does not bear this out. In pertinent part, 10 U.S.C. 1552(a) reads:

> The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, *may* correct any military record of that department *when he considers it necessary* to correct an error or remove an injustice. [Emphasis added.]

Plainly, this is a grant of discretionary authority, not a mandate. The language is not misleading: the history of the provision clearly indicates that its purpose was to shift to the executive branch the burden

of considering relief as a matter of grace in those cases formerly handled by the Congress through private bills.[23] See 40 Ops. Atty. Gen. 504 (1947); *Ogden* v. *Zuckert*, 298 F. 2d 312, 314–315 (C.A.D.C.). See also, *Friedman* v. *United States*, 310 F. 2d 381, 404 (Ct. Cls.); *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cls.). But even if the statute imposes an obligation to take affirmative action in some contexts, it cannot have that effect here.

The original discharge was in no sense a mistake. As we have already noted, petitioner was dismissed not because of his actual guilt, but because of his prospective unavailability and because of the morale problems involved in retaining a man authoritatively branded a criminal, whether rightly or wrongly. The reversal of his conviction accordingly does not affect the justification for the initial discharge. That action remains correct. We assume that petitioner was then entitled to a lifting of the "undesirable" label, but that is not what he requested, and that relief, in any

[23] As originally enacted, the legislation authorized the service secretaries "to correct any military or naval record *where in their judgment such action is necessary* to correct an error or remove an injustice * * *" (emphasis supplied). 65 Stat. 655. This was clearly understood by the subcommittee sponsoring the legislation as vesting discretion in the appropriate Secretary to determine when an occasion calling for the correction of an injustice existed. See, *Hearings Before a Subcommittee of the House Committee on the Armed Services on H.R. 1181*, 82d Cong., 1st Sess., 375–381 (1951). The present language of Section 1552(a) was enacted in 1956 (70A Stat. 116) as part of the general codification of Titles 10 and 32 relating to the Armed Forces and the National Guard and was not intended to be a substantive change. See H. Rep. 970, 84th Cong., 1st Sess., 8–9 (1955).

event, has been made available. He could demand no more, as a matter of right.

Doubtless, as a matter of *discretion,* the Correction Board might have ordered petitioner reinstated, with or without back pay. 10 U.S.C. 1552 (a) and (c). But this was a decision, at least within very broad limits, for the Board. The scheme of the law is to treat the man already discharged very much as an applicant for reinlistment, who must be recommended by prior creditable service and who, if that service was not altogether "honest and faithful," must convince the Air Force that his subsequent conduct has been good. See 10 U.S.C. 8253(b), 8256(c). There can be no serious claim that the Board and the Secretary were grossly arbitrary in refusing reinstatement to an airman whom they found to be thoroughly untruthful.

Nor was there anything improper about the Board's proceedings leading to the conclusion that petitioner was not a fit subject to take back into the Air Force. After his conviction had been set aside by the appellate court and the charges against him dismissed, petitioner, with the assistance of counsel, applied to the Correction Board for reinstatement in the Air Force. He indicated in his application that he desired to appear before the Board in person (R. 10), which was permitted as a matter of course under the Correction Board regulations. 32 C.F.R. 881.4(a) He testified before the Board voluntarily. Following some

remarks concerning his good character and prior good conduct, and under the guidance of his own counsel, he elected to discuss and explain the circumstances leading up to his conviction for second degree rape (R. 35). The Criminal Court of Appeals of Oklahoma had set aside that conviction for reasons unconnected with the merits of the charge. The accusation was of course a serious one, and since the Oklahoma appellate court, though reversing the conviction, had expressed strong doubts regarding petitioner's veracity,[24] it was not unreasonable for the Board members to inquire into the subject after petitioner voluntarily chose to broach it. In the Board's estimation, petitioner's responses to their inquiry were evasive, misleading, and unworthy of belief (R. 22). The Board members declined to recommend petitioner for reinstatement, not because of his conviction, but because of his conduct before them, which, in their view, demonstrated his unfitness for Air Force service. Their action was, we submit, reasonable and certainly within their province.

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[24] *Jackson* v. *State*, 316 P. 2d 213, 216: "The state charges the defendant had sexual relations with her. He denies that he had such relations with her, although he admits he was in bed with her. He related she kept her clothes on. This is the most unbelievable part of defendant's story, but the case is not here for review on the merits and such matters are not for our consideration at this time."

CONCLUSION

For the reasons stated, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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APPENDIX

10 U.S.C. 1552 provides:

Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army,

Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

(f) The Secretary of Defense for the military departments, and the Secretary of the Treasury for the Coast Guard, shall report to Congress every six months on claims paid under this section during the period covered by the report. The report shall include for each claim the name of the claimant, a brief description of the claim, and a statement of the amount paid.

10 U.S.C. 8811 provides:

Air Force enlisted members: discharge certificate; limitations on discharge

(a) A discharge certificate shall be given to each lawfully inducted or enlisted member of the Air Force upon his discharge.

(b) No enlisted member of the Air Force may be discharged before his term of service expires, except—

(1) as prescribed by the Secretary of the Air Force;

(2) by sentence of a general or special court-martial; or

(3) as otherwise provided by law.

Air Force Regulation 39-22, effective April 14, 1959, in pertinent part provides:

2. *The Conditions Which Subject an Airman to Discharge.* An airman is subject to discharge for misconduct under this regulation upon conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year; or which involves moral turpitude;

* * * * *

3. *Waiver Action.* Cases often arise which warrant waiver consideration with a view to retention of the airman in the service. In determining whether a waiver should be recommended, full consideration should be given to the gravity of the specific offense involved, the

circumstances relating thereto and any matters in extenuation. Additionally, the military record of the airman prior to the commission of the offense should be considered as well as prospects for rehabilitation. As a general rule, those involved in offenses of moral turpitude, as defined, should not be recommended for waivers. However, even in this category there may exist unusual circumstances warranting waiver consideration, although exceptions to the general rule should not be considered for those involved in homosexual offenses and those who have taken drugs intravenously. When a waiver recommendation is being considered for an airman involved in an offense of moral turpitude, the airman will be referred for psychiatric examination, and the report and recommendations of the psychiatrist will be attached to the file in the case.

4. *Constructive Waiver.* When information is received by a command to show that an airman is subject to discharge under this regulation, action should be instituted without delay to finalize the case with regard to discharge or waiver. If the required action is not taken, the airman may become the recipient of a constructive waiver, as the failure to exercise the option to discharge after disposition by civil authorities is known, signifies that the intention was to retain the airman in the service. The option to discharge under this regulation cannot be revived at a later date even though the behavior of the airman, subsequent to disposition by civil authorities, has demonstrated that he should have been recommended for discharge after all. What constitutes a later date is a matter for determination under the circumstances of a particular case. No specified time limit can be prescribed. It could be a matter of but a few weeks if the evidence at hand shows that he is currently being recommended for discharge under this regulation because of

events subsequent to the conviction, such as AWOL or commission of a new offense, and not solely because of the conviction itself, thereby demonstrating, in retrospect, that it was a mistake to have disregarded the conviction. Where action has been initiated, as required, to finalize a case after disposition by civil authorities is known, the passing of time would be immaterial to the issue of whether a constructive waiver has resulted, as the passing of time was necessary to process the case in order to arrive at an appropriate disposition.

5. *Types of Discharges Permitted.* An airman discharged under this regulation should be furnished an Undesirable Discharge, unless the particular circumstances in a given case warrant a General or Honorable Discharge. Criteria for the issuance of an Undesirable, General, or Honorable Discharge is outlined in paragraph 9, AFR 39-10. Commanders and members of boards of officers responsible for recommending discharge under this regulation, and commanders empowered to determine finally the type of discharge to be issued, *will review and be guided by* the criteria in their considgration of the type of discharge to be issued.

6. *Who May Authorize Discharge or Waiver:*

a. The commander exercising general court-martial jurisdiction is authorized to personally finalize cases under this regulation involving discharge or waiver when disposition of an airman was made by civil court in the zone of interior, Alaska, Territory or possession, except that he may designate his deputy and/or vice commander to personally finalize such cases when they do not involve the approval and issuance of an Undesirable Discharge.

b. Headquarters USAF is authorized to finalize cases under this regulation involving discharge or waiver when disposition of an airman was made by civil court of a foreign country.

7. *Procedure for Discharge.* When an airman is recommended for discharge under this regulation, the following procedure will apply:

a. *Counsel for the Airman.* The immediate commander will take action to obtain military counsel for the airman, who, if reasonably available, should be a lawyer.

b. *Notification to the Airman.* After arrangements have been made for military counsel to represent the airman, the immediate commander will call in the airman if he is available and furnish him a letter of notification, which will include the following:

(1) Notice of the proposed action to discharge him under AFR 39–22.

(2) Specific reason for the proposed discharge; type of discharge being recommended (Undesirable, General or Honorable), and advice that the final decision in the case rests with the discharge authority.

(3) That military counsel (give grade and name) has been obtained to assist him; that in lieu of appointed counsel, he may have counsel of his own choice, provided requested counsel is serving in the active military service and is reasonably available (such determination to be made by the immediate commander of the counsel requested); that in lieu of military counsel, he has the right to employ civilian counsel, and that if civilian counsel is employed, it should be understood that any expenses incident to the employment of civilian counsel will not be paid by the Air Force, as no funds exist for such purpose. Further, advise the airman that if he waives his right to military counsel, he must furnish a written statement to that effect, which will be attached to the file in his case.

(4) Advice that he has the opportunity to request or waive, in writing, the following privileges:

(a) To have his case heard by a Board of not less than three officers. In the case of non-

regular component members, all boards so convened shall include appropriate numbers from the Reserve components. In the case of female members, all boards so convened shall include at least one female officer.

(b) To appear in person before such board, subject to his availability, e.g., not in civil confinement.

(c) To be represented by counsel, who, if reasonably available, should be a lawyer.

(d) To submit statements in his own behalf.

(5) That if he waives his privilege to a hearing before a board of officers, he is required to submit a signed statement as indicated in attachment 1 to AFR 39-22. Furnish the airman a copy of AFR 39-22.

(6) That he confer with his counsel concerning the case and reply in writing with the least practicable delay, setting forth the privileges he elects. That if he waives board proceedings and wishes to submit written statements in his own behalf, he should submit these statements with his reply so they can be attached to the file in his case for consideration of the discharge authority.

(7) Any other information considered appropriate to the case.

c. *When Airman Requests a Board Hearing.* If the airman requests a board hearing the immediate commander will refer the case, without delay, to the commander exercising special court-martial jurisdiction, who will convene a board of officers.

NOTE: In foreign civil court cases, board proceedings will be reviewed for legal sufficiency by the staff judge advocate in the Headquarters of the commander exercising general court-martial jurisdiction. The recommendations of the commander exercising general court-martial jurisdiction will be furnished upon transmittal of the proceedings, through command channels, to Headquarters, USAF.

d. *The Board of Officers.* The board will consist of not less than three voting officers, at least one of whom is of field grade. If the airman had entered on active duty as a member of a Reserve component, the membership of the board will include a majority of Reserve officers, if available. Where a majority of Reserve component members is not available, the board will include not less than one Reserve component officer. Where the respondent is a female, at least one member of the board will also be a female. It will be the function of the board to recommend whether the airman should be discharged or granted a waiver to permit retention in the Air Force. Where a recommendation for discharge is made the board will also recommend the type of discharge to be issued to the airman.

e. *When the Airman is Not Available.* When the whereabouts of an airman is known but he is not available and could not be present at a board hearing even if such hearing were requested by him, as for example, when confined by civil authorities or other reason precluding his presence, military counsel will be appointed to represent the airman and notification of the proposed discharge will be accomplished by registered mail, return receipt requested. The airman will be informed of the appointment of counsel to represent him in his absence, of the privileges available to him, and that if he requests a board hearing it will be held in his absence. He will be requested to expedite his reply and advised that if reply is not received within 30 days of the date of letter of notification, the recommendation for his discharge, if approved by the discharge authority, may be effected in absentia, with the type of discharge determined to be appropriate by the discharge authority. In the event the airman does not reply within the prescribed time, discharge may be finalized, as

indicated. Where warranted by the distances involved or other circumstances, a period in excess of 30 days may be allowed the airman for his reply.

f. *AWOL Airmen Whose Whereabouts Are Unknown.* The procedures herein are waived with respect to AWOL airmen whose whereabouts are unknown. The discharge of such an airman may be effected, in absentia, with the type of discharge determined to be appropriate by the discharge authority.

* * * *

8. *Action of the Discharge Authority.* The discharge authority is authorized to finalize cases submitted to him as follows:

a. *Where Board Proceedings Are Not Involved.* Where the airman did not avail himself of a board hearing the discharge authority may authorize discharge of the airman or grant him a waiver, as considered appropriate. Where discharge is considered appropriate he also will determine the type of discharge to be issued.

b. *Where Board Proceedings Are Involved.* Where the airman had a board hearing the discharge authority may take the following action:

(1) If the board of officers recommended discharge he may authorize discharge or grant a waiver. If he authorizes discharge he may also approve the issuance of the type of discharge recommended by the board or approve the issuance of a better type of discharge. However, he may not approve a discharge inferior to the one recommended by the board.

(2) If the board of officers recommended waiver he may approve that recommendation and may not order discharge.

(3) If the findings of the board are not consistent with the facts in the case or the recommendations of the board are not consistent with the findings, the discharge authority

may set aside the board's findings and recommendations and direct that a new board of officers be appointed to hear and consider the case. In such instance no voting member of the new board may have been a member of the first board. Where a new board is appointed the proceedings of the first board, less the findings and recommendations, will be forwarded to the new board for its information and consideration.

9. *When the Immediate Commander Is Recommending Waiver.* When the immediate commander is recommending a waiver for the purpose of retention of the airman in the service, no action will be required under the provisions of paragraph 7, unless the discharge authority does not concur in the recommended waiver and believes that consideration should be given to the discharge of the airman. Where this situation arises the case will be referred back to the immediate commander in order that the airman can be accorded the privileges outlined in paragraph 7, as if he had been initially recommended for discharge.

* * * * *

11. *Appeals of Airmen to Civil Court Disposition.* An airman subject to discharge under this Regulation may be processed for discharge or waiver even though he has filed an appeal to the civil court action in his case or has stated his intention of doing so. However, it will be the general policy to withhold the execution of an approved discharge pending outcome of the appeal. In the event the appeal results in the conviction being set aside the airman will not be discharged under this Regulation, although he may be considered for discharge under other regulations, if appropriate, as outlined in paragraph 12. In the event the execution of a discharge under this Regulation is considered appropriate, without awaiting outcome of an ap-

peal, the case will be referred to the Director of Military Personnel, Headquarters, USAF, for a decision.

* * * * * *

27. *Retention in the Air Force Beyond Expiration of Term of Service.* Where the enlistment contract of an airman is nearing completion and he is on a duty status, although awaiting trial or the outcome of an appeal; and it is probable that his term of service will expire before the civil authorities decide his case, take the following action:

a. Call in the airman and suggest to him that he voluntarily extend his enlistment pending disposition of his civil court case. Explain to him that it is to his advantage to do so, since he will be entitled to pay and allowances so long as he remains on a duty status. Also, where applicable, explain to him that were he discharged he might be liable to confinement by civil authorities pending disposition of his case.

b. If the airman will not voluntarily extend his enlistment pending disposition of his civil court case, and it is probable that his enlistment will expire before such disposition, send a message report to Headquarters USAF, giving the following information:

(1) Date of enlistment and length thereof.

(2) Number of days time lost during the enlistment.

(3) Approximate date of trial or hearing on his appeal.

(4) Brief synopsis of background of civil court case.

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